83-977

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No.

LOUIE L. WAINWRIGHT, Secretary
Department of Offender Rehabilitation
State of Florida

Petitioner,

vs.

JOHN HUDGINS,
#045861

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[redacted]

JIM SMITH
ATTORNEY GENERAL

THEDA JAMES DAVIS
Assistant Attorney General

ROBERT J. LANDRY
Assistant Attorney General

1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision below conflicts with decisions of this Court requiring the exhaustion of state judicial remedies.

2. Whether the federal constitutional standard to establish double jeopardy in violation of the Fifth Amendment is similar to Florida's 'single transaction rule', so as to permit the district court to consider the respondent's claim as one involving double jeopardy.

3. Whether respondent's dual sentence for aggravated battery and for possession of a firearm while engaged in a criminal offense violates the Fifth Amendment prohibition against double jeopardy.

4. Whether the decision below conflicts with decisions of this Court which hold that challenges to the state court's

application of its own laws or rules does not state a basis for federal habeas corpus relief.

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OPINIONS BELOW

The unpublished per curiam opinion of the United States Court of Appeals, Eleventh Circuit, appears in the appendix hereto as "A.1" The order of the District Court, Southern District of Florida, Miami Division, appears in the appendix as "A.18 - 34."

JURISDICTION

On August 29, 1983, the United States Court of Appeals for the Eleventh Circuit affirmed (without opinion) an order of the United States District Court dated October 23, 1981, granting a petition for writ of habeas corpus brought by a state prisoner pursuant to 28 U.S.C. §2254. A timely petition for rehearing was denied on September 28, 1983 and this Petition for Certiorari was filed within sixty (60) days of this date. The jurisdiction of this Court is invoked pursuant to the specific provisions of Rule 17 of the Rules of the Supreme Court, Title 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V of the Constitution of the United States provides that:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use without just compensation."

Title 28 U.S.C. §2254(a) - (c) provides that:

> "(a) The Supreme Court, a justice thereof, a circuit judge or a District Court shall entertain an application for a Writ of Habeas Corpus in behalf of a person in custody pursuant to the judgment of a State Court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court

shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

STATEMENT OF THE CASE

On September 6, 1978, respondent, a Florida prisoner, entered a plea of no contest to charges of aggravated battery, unlawful possession of a firearm while engaged in a criminal offense and unlawful possession of a firearm by a convicted felon. Adjudication was withheld and respondent was placed on three concurrent seven year terms of probation. Probation was subsequently revoked and respondent was sentenced to fifteen years imprisonment on each count, sentences to run consecutively.

Thereafter, Hudgins filed with the state trial court a motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850. Among other things, Hudgins challenged the legality of his sentence for both aggravated battery and possession of a firearm while engaged

in a criminal offense. The gist of respondent's argument was that separate sentences for aggravated battery and possession of a firearm during the commission of that aggravated battery violates Florida's single transaction rule as set forth in Johnson v. State, 366 So.2d 418 (Fla. 1978). The motion was denied and respondent renewed his single transaction argument before the Florida Supreme Court which denied review.

The respondent then filed a petition for writ of habeas corpus pursuant to 28 U.S.C. §2254 in the United States District Court for the Southern District of Florida, raising the same 'single transaction' argument presented to the Florida courts. The district court granted the writ although it acknowledged that respondent had not raised his claim as a question of federal constitutional law.

Treating the claim as exhausted for purposes of §2254, the court reasoned that "the federal constitutional standard to establish double jeopardy in violation of the Fifth Amendment is similar to the State's 'single transaction rule', so as to permit this Court to consider the Petitioner's claim as one involving double jeopardy." (A.24-25) The Court of Appeals for the Eleventh Circuit affirmed without opinion (A.1) and following the denial of a timely motion for rehearing (A.2-17), the State sought certiorari review in this Court.

REASONS FOR GRANTING WRIT

1. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING FEDERAL QUESTIONS INVOLVED IN THOUSANDS OF HABEAS CORPUS PETITIONS FILED BY STATE PRISONERS.

The exhaustion of state remedies doctrine, now codified in the federal habeas statute, 28 U.S.C. §2254(b) and (c),[1] reflects a policy of federal-state comity.

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[1] Title 28 U.S.C §2254 provides in pertinent part:

"(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

"(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

Its purpose is to afford the state courts, which have equal responsibility with the federal courts to uphold federal constitutional law, the initial opportunity to pass upon and correct alleged violations of its prisoners' federal rights. Ex parte Royall, 117 U.S. 241, 250 - 251 (1886); Fay v. Noia, 372 U.S 391, 418 (1963); Wilwording v. Swenson, 404 U.S. 249, 250 (1971). This Court has consistently adhered to this federal policy. See e.g., Picard v. Connor, 404 U.S. 270 (1971); Mabry v. Klimas, 448 U.S. 444 (1980); Anderson v. Harless, __ U.S. __, 103 S.Ct. __, 74 L.Ed.2d 3 (1982). See also, Rose v. Lundy, 455 U.S. 509 (1982).

The federal district court acknowledged that Hudgins' claim was raised as a question of state law but treated the claim as predicated on federal constitutional law because, as stated by the

court, "the federal constitutional standard to establish double jeopardy in violation of the Fifth Amendment is similar to the state's single transaction rule." (A.24-25) The United States Court of Appeals for the Eleventh Circuit affirmed without opinion. (A.1)

The decision below is erroneous and presents an important question of federal constitutional law. It is necessary that this Court establish a consistent and workable standard by which federal district courts may judge whether or not state court remedies have been exhausted for purposes of Picard v. Connor.

In addition, the issues raised herein are recurring. Judge Van Graafeiland recently observed in Daye v. Attorney General of the State of New York, 696 F.2d 186, 201 (2d Cir. 1982) (en banc) (dissenting opinion) that during the past three years

this Court has granted certiorari and reversed seventeen cases in which §2254 writs had been granted state prisoners. Five of these reversals, says Judge Van Graafeiland, was based upon the petitioner's failure to exhaust state remedies, citing Mabry v. Klimas, 448 U.S. 444, 447 (1980) (per curiam); Duckworth v. Serrano, 454 U.S. 1 (1981) (per curiam); Rose v. Lundy, 455 U.S. 509 (1982); Engle v. Isaac, 456 U.S. 107 (1982); Anderson v. Harless, __ U.S. __, 103 S.Ct. 276, 74 L.Ed.2d 3 (1982) (per curiam).

Since Picard federal courts have been repeatedly confronted with the difficult question of deciding where to draw the line. Some circuits have tended to construe Picard rather narrowly, requiring strict compliance with the exhaustion doctrine and limiting federal intervention to those cases where the record is clear that

the specific federal constitutional claim was presented in the state courts. See e.g., Conner v. Auger, 595 F.2d 407, 413 (8th Cir.), cert. denied, 444 U.S. 851 (1979); Johnson v. Metz, 609 F.2d 1052, 1054 (2d Cir. 1979); Gayle v. LeFevre, 613 F.2d 21, 22 n. 1 (2d Cir. 1980); Paulette v. Howard, 634 F.2d 117, 119 - 120 (3d Cir. 1980); Wilks v. Israel, 627 F.2d 32, 37 - 38 (7th Cir.), cert. denied, 449 US. 1086 (1980). Other circuits, on the other hand, have adopted a more liberal approach, treating claims as exhausted when "the nature or presentation of the claim must have been likely to alert the [state] court to the claim's federal nature." Daye v. Attorney General of the State of New York, supra at 192. See e.g., Macon v. Lash, 458 F.2d 942, 948 (7th Cir. 1972); Blankenship v. Estelle, 545 F.2d 510, 514 - 515 (5th Cir. 1977), cert.

denied, 444 U.S. 856 (1979). The decision below only exacerbates the confusion that already exists in this area and at the same time substantially undercuts the exhaustion doctrine. It is important that this Court provide guidance in this area by establishing a workable standard by which federal courts may judge whether or not state court remedies have been exhausted for purposes of Picard v. Connor.

2. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT REQUIRING THE EXHAUSTION OF STATE JUDICIAL REMEDIES.

The decision below conflicts with decisions of this Court requiring exhaustion of state judicial remedies pursuant to 28 U.S.C. §2254.

State judicial remedies have been exhausted when the claim brought before the federal court is the "substantial equivalent" of a claim already presented

to the state courts. Picard v. Connor, supra at 278. The claim that a sentence violates Florida's single transaction rule is not the "substantial equivalent" of a claim that a sentence violates the federal constitutional prohibition against double jeopardy.

The decision of the lower court is in direct conflict with Picard. There, the Court of Appeals granted a writ of habeas corpus to a state prisoner although it acknowledged that the respondent had not previously raised an equal protection issue in the state courts. Connor had consistently argued that his indictment for murder did not comply with state law. As noted by this Court, "[t]he equal protection issue entered this case only because the Court of Appeals injected it." Id. at 277. This Court reversed, holding that the substance of a federal habeas

claim must in the first instance be fairly presented to the state courts. Id. at 278.

As in Picard, the respondent herein consistently argued in both the state and federal court that his sentence violated state law. Also like Picard, the double jeopardy issue only entered this case because the district court injected it. The record is clear that the double jeopardy argument was never presented to, or considered by, the Florida courts. The decision of the lower court is a clear departure from the rule of exhaustion announced by this Court in Picard. Under these circumstances, summary reversal would be appropriate.

Most recently this court was confronted with a similar situation in Anderson v. Harless, __ U.S. __, 793 S.Ct. __, 74 L.Ed.2d 3 (1982). Harless argued that the

state trial court's instruction on the element of malice was erroneous under Michigan state law. In support of that conclusion, the defendant relied upon People v. Martin, 392 Mich. 553, 221 N.W. 2d 336 (1974), a state court decision predicated solely on an interpretation of state law. In habeas proceedings before the United States District Court, Harless argued broadly that the trial court's instruction was unconstitutional. The District Court treated the claim as predicated on federal constitutional law and held that the instruction unconstitutionally shifted the burden of proof to the defendant. The court also held that Harless had exhausted available state court remedies as required by 28 U.S.C. §2254 and granted the application for writ of habeas corpus. The United States Court of Appeals for the Sixth Circuit affirmed,

holding that the defendant's claim had been properly exhausted in the state courts because Harless had presented to the Michigan Court of Appeals the facts on which he had based his federal claim. The court also held that Harless' reliance on the previous state court decision was sufficient to present the state courts with the substance of his due process challenge to the malice instruction. On certiorari this Court reversed. In a per curiam opinion joined in by six members of the Court it was held that Harless had not exhausted his state court remedies, as required by 28 U.S.C. §2254, since the due process ramifications of the defendant's argument to the state court was not self-evident, and the defendant's reliance on the previous state court decision was not sufficient to present the state courts with the substance of his due process

challenge being asserted in the habeas corpus proceeding.

In the present case, respondent challenged his sentence under Florida law. As in Anderson, he relied solely upon a state court decision, Johnson v. State, supra, a decision predicated solely on state law in which no federal constitutional issues were decided.[2] The Florida courts understandably interpreted respondent's claim as being predicated on the state-law rule and analyzed it accordingly.

Since it appears that Hudgins is

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[2] The Florida Supreme Court in Johnson v. State, 366 So.2d 418 (Fla. 1978) expressly declined to reach the Petitioner's Fifth Amendment claim. The court said:

> Since our disposition of these cases under Cone makes it unnecessary for us to reach petitioner's Fifth Amendment claims, we will not address these constitutional issues until they are properly presented under the new statute.
>
> Text of opinion at 421

still free to present his constitutional claim to the Florida courts[3] we submit that respondent has not exausted his available state judicial remedies as required by 28 U.S.C. §2254.

3. WHETHER THE FEDERAL CONSTITUTIONAL STANDARD TO ESTABLISH DOUBLE JEOPARDY IN VIOLATION OF THE FIFTH AMENDMENT IS SIMILAR TO FLORIDA'S 'SINGLE TRANSACTION RULE', SO AS TO PERMIT THE DISTRICT COURT TO CONSIDER THE RESPONDENT'S CLAIM AS ONE INVOLVING DOUBLE JEOPARDY.

The district court based its grant of habeas relief in this case on the theory that Florida's single transaction rule is "similar" to the federal constitutional

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[3] In Florida, post-conviction relief is provided for under Florida Rule of Criminal Procedure 3.850. The rule specifically provides relief for prisoners claiming a violation of the Constitution or Laws of the United States.

standard to establish double jeopardy. (A.24 - 25) The Court of Appeals affirmed this erroneous conclusion.

Contrary to the district court's conclusion, Florida's single transaction rule is not the same as the federal constitutional standard to establish double jeopardy. Florida's single transaction rule has its origin in Simmons v. State, 151 Fla. 778, 10 So.2d 436 (1942). It was there held that a person charged with several offenses arising from a single criminal transaction should only be convicted of the most serious offense. In Johnson v. State, supra, relied upon by respondent, the Florida Supreme Court held that one who is convicted of both robbery and display of a firearm during the commission of that robbery cannot be separately sentenced for each offense. Double jeopardy, on the other hand, concerns itself with

multiple punishments for the same offense. Brown v Ohio, 432 U.S. 161, 165 (1977). Where multiple sentences are imposed in a single trial, the role of the Double Jeopardy Clause is limited to assuring that the sentencing court does not prescribe greater punishment than the legislature intended. Whalen v. United States, 445 U.S. 684, 697 (1980) (Blackmun, concurring); Missouri v. Hunter, __ U.S., __ 103 S.Ct. __, 74 L.Ed.2d 535, 542 (1983). Thus, contrary to the district court's conclusion, Florida's single transaction rule is not similar to the federal constitutional standard to establish double jeopardy.

4. WHETHER RESPONDENT'S DUAL SENTENCE FOR AGGRAVATED BATTERY AND FOR POSSESSION OF A FIREARM WHILE ENGAGED IN A CRIMINAL OFFENSE VIOLATES THE FIFTH AMENDMENT PROHIBITION AGAINST DOUBLE JEOPARDY.

The district court held that respondent's dual sentence for aggravated battery and possession of a firearm while engaged in a criminal offense violates the Fifth Amendment prohibition against double jeopardy. (A.27) The district court has misperceived the nature of the Fifth Amendment prohibition against double jeopardy. The Double Jeopardy Clause does not present a substantive limitation on the power of the legislature to prescribe multiple punishment. Whalen v. United States, 445 U.S. 684, 697 (1980) (Justice Blackmun, concurring). In Whalen, this court noted that the assumption underlying the Blockburger[4] rule is that Congress ordinarily does not intend to punish the same offense under two different statutes.

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[4] Blockburger v. United States, 284 U.S. 299 (1932).

Id. at 691-692. Elaborating on this point in Albernaz v. United States, 450 U.S. 333, 340 (1981), this Court explained that the Blockburger test is a rule of statutory construction and is not intended to supercede legislative intent. Finally, in Missouri v. Hunter, __ U.S. __, 103 S.Ct. __, 74 L.Ed.2d 535 (1983), this Court made it clear that the question of whether cumulative punishment is authorized turns on a determination of legislative intent. This Court explained:

> Our analysis and reasoning in Whalen and Albernaz lead inescapably to the conclusion that simply because two criminal statutes may be construed to proscribe the same conduct under the Blockburger test does not mean that the Double Jeopardy Clause precludes the imposition, in a single trial, of cumulative punishment pursuant to those statutes. The rule of statutory construction noted in Whalen is not a constitutional rule requiring courts to negate clearly expressed legislative intent. Thus far, we have utilized that rule only to limit a

> federal court's power to impose conviction and punishment when the will of Congress is not clear. Here, the Missouri Legislature has made the intent crystal clear. Legislatures, not courts, prescribe the scope of punishments.
>
> Where, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the "same" conduct under Blockburger, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.
>
> 94 L.Ed.2d at 543 - 544

Thus, contrary to the district court's conclusion, dual sentencing for aggravated battery and possession of a firearm while engaged in a criminal offense, if authorized by the Florida legislature, does not violate the federal constitutional prohibition against double jeopardy.

Where legislative intent is not

clear, the court must resort to the Blockburger test to determine the scope of punishmment. The district court erred in the application of the Blockburger test to the facts of this case. The Blockburger test emphasizes the elements of the two crimes. Brown v. Ohio, 432 U.S. 161, 166 (1977) (emphasis supplied). "If each requires proof of a fact that the other does not, the Blockburger test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes." Iannelli v. United States, 420 U.S. 770, 785, n. 17 (1975). The statutory provisions at issue here clearly satisfy the Blockburger test as they specify different elements of proof.[5] The

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[5] The use or display of a firearm during the commission of a criminal offense is set forth in Fla. Stat. §790.07(1):

essence of the handgun offense is the use of a firearm during the commission of a criminal offense, an element not contained in the statutory definition of aggravated battery. In a similar fashion, proof of aggravated battery requires proof of a

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> Whoever, while committing or attempting to commit any felony or while under indictment, displays, uses, threatens, or attempts to use any firearm or carries a concealed firearm is guilty of a felony of the second degree, punishable as provided in §775.082, §775.083 and §775.084.
>
> Fla. Stat. §784.05 defines aggravated battery as follows:
>
> (1) A person commits aggravated battery who, in committing battery:
>
> (a) Intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfiguration; or
>
> (b) Uses a deadly weapon.

fact not required for conviction of the handgun offense. To establish a violation of aggravated battery, the prosecution must show permanent disability or use of a deadly weapon. Where permanent disability results, use of a deadly weapon need not be established. Contrary to the conclusion of the district court, these two offenses are sufficiently distinguishable under the Blockburger test to permit the imposition of separate sentences.

5. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT WHICH HOLD THAT CHALLENGES TO THE STATE COURT'S APPLICATION OF ITS OWN LAWS OR RULES DOES NOT STATE A BASIS FOR FEDERAL HABEAS CORPUS RELIEF.

This Court has consistently held that challenges to the state court's application of its own laws or rules does not state a basis for federal habeas corpus

relief. Engle v. Isaac, 456 U.S. 107 (1982); Gryger v. Burke, 334 U.S. 728 (1948). See also, Barclay v. The State of Florida, 33 Criminal Law Reporter 3292 (1983).

In Engle v. Isaac, supra, three respondents unsuccessfully sought a writ of habeas corpus from a federal district court. Respondents challenged the correctness of a self-defense instruction given without objection at their state trials. The Court of Appeals for the Sixth Circuit, sitting en banc, reversed all three district court orders. On certiorari, this Court reversed and remanded. In an opinion by Justice O'Connor, joined in by four members of the court, it was held that the respondents challenge to jury instructions under Ohio law did not state a basis for federal habeas corpus

relief.[6] The court said:

> . . . Insofar as respondents simply challenge the correctness of the self-defense instructions under Ohio law, they allege no deprivation of federal rights and may not obtain habeas relief.
>
> 71 L.Ed.2d at 796

The Isaac holding was based, in large part, upon policy considerations expressed in a previous decision of this Court, Court, Gryger v. Burke, supra. In Gryger, this Court said:

> We cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question.
>
> 334 U.S. at 731

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[6] The Court of Appeals read the respondent's habeas petitions to state at least two constitutional claims. The Supreme Court rejected the first claim as raising a question of state law. The second claim, although accepted as a "plausible constitutional claim," was held barred by procedural default. Engle v. Isaac, 456 U.S. 107 (1982).

The Gryger case is cited with approval in a recent decision of this Court, Barclay v. The State of Florida, supra at 3297.

The respondent herein challenged the state court's application of a local rule. Application of the single transaction rule, or the refusal to apply it to a given set of facts, is exclusively a matter of local law to be resolved by the state courts. As is evident from Isaac and Gryger, challenges to the state court's application of its own laws or rules does not state a basis for federal habeas corpus relief as it involves no federal constitutional question. The lower court erred in granting federal habeas corpus relief on a question of state law.

CONCLUSION

For these reasons, petitioner respectfully urges this Court to grant Certiorari and reverse the decision of the

Court of Appeals in and for the Eleventh Circuit.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

THEDA JAMES DAVIS
Assistant Attorney General
1313 Tampa Street, Suit 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

ROBERT J. LANDRY
Assistant Attorney General
1313 Tampa Street, Suit 804
Park Trammell Building
Tampa, Florida 33602
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APPENDIX
FOR

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF PETITIONER ON JURISDICTION

JIM SMITH
ATTORNEY GENERAL

THEDA JAMES DAVIS
Assistant Attorney General

ROBERT J. LANDRY
Assistant Attorney General

1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 82-5379

JOHN HUDGINS,

Petitioner-Appellee

versus

LOUIE L. WAINWRIGHT,
Secretary, Department of
Corrections, State of
Florida,

Respondent-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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August 29, 1983

BEFORE FAY and KRAVITCH, Circuit Judges,

and ATKINS*, District Judge. PER

CURIAM: AFFIRMED. See Circuit Rule 25.

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*Honorable C. Clyde Atkins, U.S. District Judge for the Southern District of Florida, sitting by designation.

ISSUED AS MANDATE: October 11, 1983

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

JOHN HUDGINS,

Petitioner-Appellee,

vs. CASE NO. 82-5379

LOUIE L. WAINWRIGHT,
Secretary, Department of
Offender Rehabilitation,
State of Florida,

Respondent-Appellant.

MOTION FOR REHEARING

The Respondent-Appellant, Louie L. Wainwright, Secretary, Department of Offender Rehabilitation, State of Florida, by and through its undersigned counsel, moves this Honorable Court for a rehearing in the above-styled cause, and in support thereof would state:

I

ARGUMENT

This court's decision affirming the order of the District Court overlooks

decisions of the United States Supreme Court which hold that the habeas petitioner must have "fairly presented" to the state courts the "substance" of his federal habeas corpus claim. Anderson v. Harless, __ U.S __, 103 S.Ct. __, 74 L.Ed.2d 3 (1982); Picard v. Connor, 404 U.S. 270, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971). See also, Rose v. Lundy, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982).

A petitioner seeking federal habeas corpus relief pursuant to 28 U.S.C. §2254 must first exhaust all state remedies available to him. Picard v. Connor, supra. A claim is raised for purposes of exhaustion when it has been "fairly presented to the state courts." Id. at 275.

Fair presentation of a claim involves bringing a legal theory to the state court's attention and providing the state court with relevant facts. Id. at 277; Winfrey v. Maggio, 664 F.2d 550 (5th Cir. 1981). What is not fair presentation of a claim was most recently described by the United States Supreme Court in Anderson v. Harless, __ U.S. __, 103 S.Ct. __, 74 L.Ed.2d 3, 7 (1982):

> It is not enough that all the facts necessary to support the federal claim were before the state courts, [Picard v. Conner] id., at 277, 30 L.Ed.2d 438, 92 S.Ct. 509, or that a somewhat similar state law claim was made. See e.g., Gayle v. Le-Ferre, 613 F.2d 21 (CA2 1980); Pullet v. Howard, 634 F.2d 117, 119 - 120 (CA3 1980); Wilks v. Israel, 627 F.2d 32, 37 - 38 (CA7), cert. denied, 449 U.S. (1086, 66 L.Ed.2d 811, 101 S.Ct. 874 (1980); Connor v. Auger, 595 F.2d 407, 413 (CA8) cert. denied, 444 U.S. 851, 62 L.Ed.2d 67, 100 S.Ct. 104 (1979).

Thus, the exhaustion requirement can only be met when the state courts have been

given an opportunity to rule upon the specific federal claim now being asserted in the habeas corpus proceeding.

Petitioner herein argued to the state court that his dual sentence for aggravated battery and possession of a firearm while engaged in a criminal offense violated Florida's single transaction rule. In his motion for post-conviction relief before the state trial court, and in his brief to the Florida Supreme Court, petitioner relied primarily upon Johnson v. State, 366 So.2d 418 (Fla. 1978), a decision predicated solely on state law in which no federal constitutional issues were decided.[1] The Florida courts

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[1] The Florida Supreme Court specifically declined to address Johnson's Fifth Amendment claim saying:

> Since our disposition of these cases under Cone makes it unnecessary for us to reach petitioner's Fifth Amendment claims, we will not address these constitutional issues until they

correctly interpreted petitioner's claim as being predicated on the state-law rule and analyzed it accordingly. Hudgins again raised the single transaction argument in habeas proceedings before the Federal District Court. The District Court acknowledged that petitioner's claim was raised as a question of state and not federal constitutinal law. Still, the court treated the claim as predicated on constitutional law because of the similarities between the state-law rule and the federal constitutional standard to establish double jeopardy. Order Granting Petition for Writ of Habeas Corpus dated October 23, 1981 at page 3.

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are properly presented under the new statute. [referring to Fla. Stat., §775.021(4)].

Johnson v. State, 366 So.2d 418, 421 (Fla. 1978)

The facts of this case are virtually indistinguishable from Anderson v. Harless, supra. Harless argued on appeal that the trial court's instruction on the element of malice was erroneous under state law.[2] In habeas proceedings before the Federal District Court, Harless argued broadly that the trial court's instruction was "unconstitutional." Anderson v. Harless, supra, 74 L.Ed.2d at 6. The District Court treated the claim as being predicated on federal constitutional law and held that the instruction unconstitutionally shifted the burden of proof to the defendant. The court also held that Harless had exhausted available state court remedies as required by 28 U.S.C. §2254 and granted the application for Writ

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[2] In support of that conclusion, Harless relied upon People v. Martin, 392 Mich. 553, 221 N.W. 2d 336 (1974), a state court decision predicated solely on an interpretation of state law.

of Habeas Corpus. The United States Circuit Court for the Sixth Circuit affirmed. The Court of Appeals held that Harless' claim had been properly exhausted because the defendant had presented to the Michigan Court of Appeals "the facts on which he based his federal claim." Id. at 6. On certiorari, the United States Supreme Court reversed. In a per curiam opinion joined in by six members of the court, it was held that the defendant's reliance on the previous state court decision was not sufficient to present the state courts with the substance of his federal claim, and that the defendant had not exhausted his state court remedies as required by 28 U.S.C. §2254.

In the case at bar, the District Court acknowledged that petitioner's claim was raised as a question of state and not federal constitutional law. Nonetheless, the court treated the claim as predicated

on constitutional law reasoning that the state-law rule and the federal constitutional standard to establish double jeopardy are similar. The court said:

> Although the Petitioner in the instant case, has raised his claim under state and not federal constitutinal law, the federal constitutional standard to establish double jeopardy in violation of the Fifth Amendment is similar to the state's "single transaction rule" so as to permit this Court to consider the Petitioner' claim as one involving double jeopardy.
>
> Order Granting Petition for Writ of Habeas Corpus dated October 13, 1981 at page 3.

The Supreme Court held in Anderson v. Harless, supra, 74 L.Ed.2d at 7, that the exhaustion requirement is not met because "a somewhat similar state-law claim was made." The record is clear that the Fifth Amendment double jeopardy claim analyzed by the federal district court was never presented to, or considered by the Florida

courts. Applying the rationale of Harless, we contend that petitioner failed to meet the exhaustion requirement of 28 U.S.C. §2254.

Since it appears that petitioner is still free to present his constitutional claim to the Florida courts[3] we submit, as was decided in Anderson, that petitioner has not exhausted his available state remedies as required by 28 U.S.C. §2254.

II

In addition, this Court's decision affirming the order of the District Court overlooks decisions of the United States

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[3] Petitioner pleaded no contest and was placed on probation. Following probation revocation, petitioner filed a motion for post-conviction relief challenging the propriety of the sentence. Cumulative motions for post-cnoviction relief are permitted under Florida law, provided each motion presents some ground not previously considered or ruled upon. State v. Reynolds, 238 So.2d 600 (Fla. 1970).

Supreme Court which hold that challenges to the state court's application of its own laws or rules does not state a basis for federal habeas corpus relief. Engle v. Isaac, 456 U.S. 107, 102 S.Cc. 1558, 71 L.Ed.2d 782 (1982); Gryger v. Burke, 334 US. 728, 731, 68 S.Ct. 1256, 92 L.Ed. 1683 (1948). See also, Barclay v. State, 33 Criminal Law Reporter 3292 (1983).

In Engle v. Isaac, supra, three respondents unsuccessfully sought a Writ of Habeas Corpus from a Federal District Court. Respondents challenged the correctness of a self-defense instruction given without objection at their state trials. The Court of Appeals for the Sixth circuit, sitting en banc, reversed all three District Court orders. On certiorari, the United States Supreme Court reversed and remanded. In an opinion by Justice O'Connor, joined in by four

members of the court, it was held that the respondents challenge to jury instructions under Ohio law did not state a basis for federal habeas corpus relief.[4] The court said:

> A state prisoner is entitled to relief under 28 U.S.C. §2254 [28 U.S.C.S. §2254] only if he is held "in custody in violation of the Constitution or laws or treaties of the United States" Insofar as respondents simply challenge the correctness of the self-defense instructions under Ohio law, they allege no deprivation of federal rights and may not obtain habeas relief. The lower courts, however, read respondents' habeas petitions to state at least two constitutional claims. Respondents repeat both those claims here. . .
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> 71 L.Ed.2d at 795

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[4] The Court of Appeals read the respondent's habeas petitions to state at least two constitutinal claims. The Supreme Court rejected the first claim as raising a question of state law. The second claim, although accepted as a "plausible constitutional claim," was held barred by procedural default. Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982).

The court continued saying:

> While they attempt to cast their first claim in constitutional terms, we believe that this claim does no more than suggest that the instructions at respondents' trials may have violated state law. (Footnote omitted.)

71 L.Ed.2d at 796

Concurring in part, Justice Stevens wrote:

> A petition for Writ of Habeas Corpus should be dismissed if it merely attaches a constitutional label to factual allegations that do not describe a violation of any constitutional right ... Nothing in the Court's opinion persuades me that the second theory is any more "plausible than the first."

74 L.Ed.2d 805 - 806

The Isaac holding was based, in large part, upon policy considerations expressed in a previous decision of the Supreme Court, Gryger v. Burke, supra 456 U.S. at 121 n. 21, 71 L.Ed.2d at 796 n. 21. In Gryger, the court observed:

> We cannot treat a mere error of state law, if one occurred, as a

> denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question.
>
> 334 U.S. at 731; 92 L.Ed. 1687

Cited with approval in Barclay v. State, supra, at 3297.

As in Isaac, petitioner herein challenged the Florida court's application of a state law and the federal court erroneously read the petition to state a constitutional claim. Because petitioner challenges the correctness of the sentence under Florida law, he has alleged no deprivation of a federal constitutional right and may not obtain federal habeas relief. Engle v. Isaac, supra.

III

RELIEF SOUGHT

Wherefore, respondent-appellant respectfully moves this Court to grant the instant petition for rehearing and to vacate the order of the United States

District Court, Southern District of Florida, granting petitioner's application for Writ of Habeas Corpus.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

THEDA JAMES DAVIS
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by U.S. Regular Mail to: Joseph H. Serota, Esq., P.O. BOx 140800, 2401 Douglas Road, Miami, Florida 33134 this 14th day of September, 1983.

AS COUNSEL FOR APPELLANT

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 82-5379

JOHN HUDGINS,

Petitioner-Appellee,

versus

LOUIE L. WAINWRIGHT,
Secretary Department
of Corrections,

Respondent-Appellant

- - - - - - - - - - -

Appeal from the
United States District Court for
the Southern District of Florida

- - - - - - - - - - -

ON PETITION FOR REHEARING

(September 28, 1983)

Before FAY and KRAVITCH, Circuit Judges,

and ATKINS,* District Judge.

PER CURIAM:

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*Honorable C. Clyde Atkins, U.S. District Judge for the Southern District of Florida, sitting by designation.

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

REHG-4
(Rev. 6/82)

UNITES STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 81-723 CIV-EPS

JOHN HUDGINS,

Petitioner,

vs. ORDER

LOUIE L. WAINWRIGHT,
Secretary, Department of
Offender Rehabilitation,

Respondent.

John Hudgins has filed a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. §2254, attacking a forty-five year sentence imposed by the Circuit Court of the Eleventh Judicial Circuit of Dade County, Florida on January 15, 1979. Sentence was imposed following a determination that the Petitioner had violated the terms of his probation. Petitioner initially pled guilty to the crimes of aggravated battery, unlawful possession of a firearm while engaged in a criminal offense and unlawful possession

of a firearm by a convicted felon. At the time, Petitioner was serving three concurrent terms of probation of seven years each pursuant to plea negotiations of September 6, 1978. Following the revocation of his probation, consecutive terms of imprisonment of fifteen (15) years were imposed for each count.

As grounds for relief, Petitioner alleges the following:

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1. That a plea of no contest was unlawfully induced in that Petitioner was "guaranteed" that he would receive concurrent sentences but actually received consecutive terms.

2. The sentence is in violation of the "single transaction rule" in that Petitioner could not lawfully be sentenced separately for Count II, possession of a firearm while engaged in a criminal offense in that said offense was part and parcel of the transaction alleged in Count I, attempted first degree murder (reduced to aggravated battery).

This petition is now being reviewed on rehearing. Initailly, in an order dated July 14, 1981, the court ordered dismissal without prejudice because of an unexhausted claim regarding the effective assistance of counsel. However, the Petitioner has informed this Court that he wishes to abandon his claim of ineffective assistance of counsel. Therefore, the Petitioner has exhausted his state judicial remedies with regard to his remaining claims and the court may proceed to the merits.

Petitioner's first allegation is that the state failed to uphold its plea bargain agreement when he was sentenced to consecutive terms of imprisonment following the revocation of his probation. He contends that his plea of nolo contendere was induced by a guarantee of concurrent sentences.

Review of the transcript of the plea proceedings held on September 6 1978, indicates that pursuant to the negotiations, the Petitioner was sentenced to concurrent terms of probation. However, on January 15, 1979, he was found guilty of violating the terms of his probation and the consecutive prison terms were imposed. The transcript of the plea hearing indicates that the trial court judge informed the Petitioner that he would be subject to additional prison time if he violated the terms of his probation. (R 35). Furthermore, Fla. Stat. §948.06 provides that following the revocation of probation the court may "impose any sentence which it might have originally imposed before placing the probationer on probation." The Fifth Circuit has validated a similar sentence imposed by a state judge after the defendant violated his bargained-for

probation term in Williams v. Wainwright, 650 F.2d 58 (5th Cir. 1981). Therefore, Petitioner's claim is clearly without merit.

Petitioner's second claim presents a substantially more difficult question. He claims that because the elements of the crime of possession of a firearm while committing a felony are part of the same elements necessary to establish aggravated battery, that he should not have been sentenced for both. Fla. Stat. §784.045 defines aggravated battery as follows:

> (1) A person commits aggravated battery who, in committing battery:
>
> (a) Intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement; or
>
> (b) Uses a deadly weapon.

The use or display of a firearm during the commission of a felony is set forth in Fla. Stat. §790.07(2):

> Whoever, while committing or attempting to commit any felony or while under indictment, displays, uses, threatens, or attempts to use any firearm or carries a concealed firearm is guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, and s. 775.084.

The Petitioner contends that under the state "single transaction rule" he should have been separately sentenced for Count II of the information.

In Johnson v. State, 366 So.2d 418 (Fla. 1978), the Florida Supreme Court applied the "single transaction rule" to find that a defendant should not have been convicted for displaying a firearm and for robbery. The court held that the display of the firearm itself constituted the necessary element of force or of putting the victim in fear to prove the crime of robbery. The court relied on its earlier decision in Cone v. State, 285 So.2d 12 (Fla. 1973) to find that the acts of

display or use of a firearm during the commission of a robbery and the crime of robbery were facets of the same transaction which could not support separate sentences.

The Florida Surpeme Court found that two offenses were not part of the same transaction where they were temporally distinct. State v. Heisterman, 343 So.2d 1272 (Fla. 1977). In that case, the court found that the act of assault with intent to commit murder was completed before the crime of shooting a gun into an occupied dwelling took place. Therefore, the court found that the crimes were separate and did not violate state law.

Although the Petitioner in the instant case, has raised his claim under state and not federal constitutional law, the federal constitutional standard to establish double jeopardy in violation of

the Fifth Amendment is similar to the state's "single transaction rule" so as to permit this Court to consider the petitioner's claim as one involving double jeopardy. The prohibition against double jeopardy as applied to the state's through the Fourteenth Amendment, protects against multiple punishment for the same offense. United States v. Dinitz, 424 U.S. 600 (1976); North Carolina v. Pearce, 395 U.S. 711 (1969); Benton v. Maryland, 395 U.S. 784 (1969). The prohibition against double jeopardy applies where a defendant is charged twice for the same offense. Blockburger v. United States, 284 U.S. 299 (1932). The test for determining when such a violation of the right against double jeopardy occurs was set forth by the Fifth circuit in United States v. Smith, 574 F.2d 308, 310 (5th Cir. 1978):

> The classic test for determining whether two offenses are "the

same" for double jeopardy purposes was announced in Blockburger v. United States, 284 US. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Blockburger requires that each offense be examined to ascertain "whether each provision requires proof of an additional fact which the other does not." Id. at 304, 52 S.Ct. at 182; Brown v. Ohio, 432 US. 161, 168, 97 S.Ct. 2221, 52 L.Ed.2d 187 (1977); Jeffers v. United States, 432 U.S. 137, 151, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977) Under the Blockburger test, also known as the "same evidence" rule, it is possible for a single criminal act or conspiracy to give rise to multiple separate offenses. See Gore v. United States, 357 U.S. 386, 78 S.Ct. 1280, 2 L.Ed.2d 1405 (1958) (defendant convicted and received consecutive prison terms for three separate offenses arising out of single narcotics sale); United States v. Houltin, 525 F.2d 943 (5th Cir. 1976) (single conspiratorial agreement violated two specific conspiracy statutes; defendant's consecutive sentences affirmed), vacated on other grounds sub nom. Croucher v. United States, 429 U.S. 1034, 97 S.Ct. 725, 50 L.Ed.2d 745 (1977). Application of the test focuses on the statutory elements of the offenses charged. "If each requires proof of a fact the other does not, the Blockburger test is

satisfied, nothwithstanding a substantial overlap in the proof offered to establish the crimes." Iannelli v. United States, 420 U.S. 770, 785 n. 17, 95 S.Ct. 1284, 1294, 43 L.Ed.2d 616 (1975).

Application of the Blockburger test to the instant case, indicates that the sentencing for both aggravated battery and the display or use of a firearm in the commission of a felony is in violation of the double jeopardy prohibition. Whether under state or federal law, it appears that the facts needed to prove the crime of aggravated battery and the facts needed to prove the display or use of a firearm, in the commission of a felony are inseparable. The Court notes that while Count II of the Information charging the Petitioner, states that he displayed the firearm while committing the felony, the proffer of facts at the plea hearing on September 6, 1978 indicates that he did not merely

display but actually used the firearm to shoot the victim, Aldore Anderson. Because the use of the firearm against the victim and the use of deadly force to commit an aggravated battery in this case were neither temporally, nor legally or factually distinct, this court finds that the dual sentencing for aggravated battery and for use of a firearm during the commission of a felony violated the Fifth Amendment prohibition against double jeopardy.

Review of the first two counts of the Information indicated that the facts which the state needed to prove under Count II are already incorporated in Count I:

COUNT I

JANET RENO, State Attorney of the Eleventh Judicial Circuit of Florida, prosecuting for the State of Florida in the County

of Dade, under oath, information makes that JOHN HUDGINS on the 25th day of February, 1978, in the County and State aforesaid did unlawfully and feloniously attempt to commit a felony, to-wit: MURDER IN THE FIRST DEGREE, upon ALDORE ANDERSON, and in furtherance thereof, the defendant JOHN HUDGINS, with felonious intent and from a premediated design to effect the death of a human being, attempted to kill ALDORE ANDERSON, a human being and in such attempt did point a pistol at and shoot said ALDORE ANDERSON causing bodily harm, in violation of 782.04(1) and 777.04(1) Florida Statutes, contrary to the form of the Statute in such cases made and

provided, and against the peace and dignity of the State of Florida.

COUNT II

And JANET RENO, State Attorney of the Eleventh Judicial Circuit of Florida, prosecuting for the State of Florida, in the County of Dade, under oath, further information makes that JOHN HUDGINS, on the 25th day of February, 1978, in the County and State aforesaid, did unlawfully and feloniously display a certain firearm, to-wit: A PISTOL, while at said time and place the defendant was committing a felony, to-wit: ATTEMPTED MURDER IN THE FIRST DEGREE, as provided by 782.04(1) and 777.04(1)

Florida Statues, the possession and display of said firearm as aforesaid, being in violation of 790.07 Florida Statues, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

The Court further notes that the United States Supreme Court recently found an analogous situatoin involving federal law to be in violation of the double jeopardy clause. In Busic v. United States, 446 U.S. 398 (1980), the court held that 18 U.S.C. §924(c) which authorized an enhanced sentence for carrying of a firearm in the commission of a felony, could not be used where the underlying or predicate felony contains its own enhancement provision. Similarly in the instant case, the crime of battery is enhanced to

aggravated battery because of the use of a deadly weapon, it appears that the separate punishment for use of a firearm in the commission of a felony may not be imposed.

Accordingly, it is

ORDERED AND ADJUDGED as follows:

1. That the Petition for Writ of Habeas Corpus insofar as it attacks the consecutive sentencing as a breach of the plea bargain agreement is hereby DENIED.

2. That the Petitioner be resentenced concerning his second claim for relief within ninety (90) days from the date of this order. Failure to comply will cause the writ of habeas corpus to be Granted and the Petitioner released from custody.

DONE AND ORDERED At Miami, Florida,

this 23 day of October, 1981.

UNITED STATES DISTRICT JUDGE

cc Theda R. James, Esq.
Asst. Attorney General

Mr. John Hudgins

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 82-5379

JOHN HUDGINS,

Petitioner-Appellee

versus

LOUIE L. WAINWRIGHT,
Secretary, Department of
Corrections, State of
Florida,

Respondent-Appellant

Appeal from the United States District Court for the Southern District of Florida

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(August 29, 1983)

BEFORE FAY and KRAVITCH, Circuit Judges, and ATKINS*, District Judge.

PER CURIAM: AFFIRMED. See Circuit Rule 25.

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*Honorable C. Clyde Atkins, U.S. District Judge for the Southern District of Florida, sitting by designation.

ISSUED AS MANDATE: October 11, 1983